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THE BOUNDARIES BETWEEN THE EXECUTIVE, THE LEGISLATIVE AND THE JUDICIAL BRANCHES OF THE GOVERNMENT

The more one studies the history of the adoption of our Federal Constitution, and of its wonderful adaptation to the new conditions of the country as it grew in population and resources, the more he cons over the remarkable clearness, comprehensiveness and brevity of language of the instrument, the more he realizes the efficacy and value of its restraints upon the adoption of the foolish fads of a year or a Presidential term, or even of a decade, the greater becomes his profound admiration for the men whose knowledge of government, law and human nature, and whose patriotism and willingness to sacrifice individual pride of opinion in wise compromise, made the Constitution possible.

In a generation before the Revolution, 150 young men from the colonies were educated in the Inns of Court in London, and this in spite of the deep-seated prejudice that there was in New England and the other colonies against the profession of the law and against the common law as such. The eighteenth century was prolific in the discussion of the principles of government, and the fortunate neglect of the Mother Country in allowing what was practically self-government in the various colonies had formed a body of jurists and publicists who were familiar in their reading with the principles and practice of popular government and the necessity for the maintenance and protection of the institutions of civil liberty. So we find in the writings of Hamilton

and Madison and the others who took part in the Constitutional Convention itself and in the ratifying conventions, a familiarity with the history of all governments which was available in those days. They had read Montesquieu and his appreciation of the British Constitution, and his insistence that English liberty was dependent upon a separation of the government into the three branches of the executive, the legislative and the judiciary. The subsequent growth of the English system into a responsible government that really united the executive and the legislative branches, of which England and her autonomous daughters are now so proud, was certainly not foreshadowed in the relations of George III to his parliaments during the American War and so our Constitution kept the three branches as rigidly distinct as possible. But such a rigid separation, while theoretically attractive, is practically impossible, because a government is a unit, and its operation depends upon the coördination of all parts to a common end. The coördination of the three branches must be voluntary and depend upon the patriotism and civic spirit of every agent of the public in earnestly seeking to promote the beneficent and avowed object of government. If one department absolutely refuses to coördinate with the others, and by negation prevents useful action, there is practically no remedy by which it may be compelled. Fortunately the instances in which this spirit of negation has been exhibited are but few in our history. The difficulty has rather been in a conflict of activities. Each branch of the government has been wisely jealous of the encroachments by any other branch upon its field and jurisdiction. In the nature of things and in the indispensable unity of government, the lines between the legitimate activity of one and the others cannot be drawn with certainty when they approach each other. It is impossible to avoid a twilight zone in the division of powers between the three branches which in their practical exercise constantly create controversy and call for further definition and settlement by practice which constitutes precedent. Of course the judicial branch by reason of its continuity and consistency of its decisions, and its being a permanent force, has more influence than the other two branches in drawing these lines when the necessity for defining them arises in cases between actual litigants. There are controversies of this kind and not a few which have not come before the courts, and which are affected and perhaps ultimately decided in the precedents made by the other two departments. There is less doubt as to the boundary

between the jurisdiction of Congress and the courts where private right is affected by Congressional legislation than as to the line of division between Congress and the Executive. In the nature of things the definition of the executive power is more general than that of the judicial, or the legislative power. The Executive has to carry out the will of Congress expressed within the limits of its authority and the interpretation of that will by the courts expressed in their judgments, but how far the discretion of the Executive in performing these duties may be controlled by the legislatures or limited by judicial action is not so clear. What I wish to discuss is some of these doubtful questions.

We have a single head to our executive branch. The executive power is vested by the Constitution in the President. Then in addition to this general grant, he has special grants of power. He is to make appointments by and with the advice and consent of the Senate, of ambassadors, public ministers and consuls, judges of the Supreme Court, and all other officers whose appointment is not otherwise provided for; Congress having power to vest appointments to inferior places in the President alone or in the courts of law. It is his duty and therefore his power to take care that the laws be faithfully executed. The President is to receive ambassadors. Treaties are to be made by him with the advice and consent of two-thirds of the Senate present. He has the power of reprieve and pardon. He is Commander-in-Chief of the army and the navy. These are his major powers, and though the description of them is general, it is not more so than is necessary to secure the executive energy necessary to achieve promptly and effectively the will of an enterprising and ardent people. The general words of these grants, however, give rise necessarily to different constructions as they are interpreted by those in favor of a concentration of power and those who believe in its safer regulation and restriction. The argument is sometimes made that as the general executive power is vested in the President, as well as the power of appointment, he must have a supervision of the action of his subordinates which Congress may not curtail, that for Congress to lay down minute limitations as to how a subordinate executive is to do the work enjoined by a statute is to interfere with the plan of the Constitution and to take away and unduly to restrict the general executive function which the framers of the Constitution intended to vest in the one man elected by the people for the purpose. This is much too wide a view, and upon this

subject we have had an authoritative expression from the Supreme Court of the United States.

In the case of Kendall v. United States, Congress had passed a law providing that the accounts of a contractor with the post-office department should be settled by the solicitor of the treasury, and that upon the decision of the solicitor of the treasury as to credits due the contractor, the postmaster-general should officially enter the credits. The postmaster-general refused to enter the credits thus ascertained and the Circuit Court for the District of Columbia issued a mandamus to compel him to do so. It was urged on behalf of the postmaster-general that he was the subordinate of the President and as the President had the general executive power and was charged with the duty of taking care that the laws be faithfully executed, the only valid remedy was to apply to the President to decide what the duty of the postmaster-general was under the act of Congress and to direct him to do it. The court, however, took the opposite view, held that the duties of the postmaster-general in this case were ministerial and not political or discretionary either with him or with the President, and that it was the duty of the postmaster-general to enter the credits as directed by Congress. In answering the argument on behalf of the postmaster-general, the Court said:

> "The theory of the Constitution undoubtedly is, that the great powers of the government are divided into separate departments; and so far as these powers are derived from the Constitution, the departments may be regarded as independent of each other. But beyond that, all are subject to regulations by law, touching the discharge of the duties required to be performed.
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> The executive power is vested in a President; and as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power. But it by no means follows, that every officer in every branch of that department is under the exclusive direction of the President. Such a principle, we apprehend, is not, and certainly cannot be claimed by the President.
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> There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases, the duty and

> responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character."

The Court again said in the same case:

> "It was urged at the bar, that the postmaster-general was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law; and this right of the President is claimed, as growing out of the obligation imposed upon him by the Constitution, to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power, which has no countenance for its support in any part of the Constitution; and is asserting a principle, which, if carried out in its results, to call cases falling within it would be clothing the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice.
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> To contend that the obligation imposed on the President to see the laws faithfully executed, implied a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible."

Of course it had been settled before the Kendall Case, in Marbury v. Madison, that where a duty is plainly marked out in the statute for a subordinate of the President and he is merely to be used as a finger of Congress to accomplish a specific thing, he may be compelled by the Court to do it. The distinction between such a duty and that of an executive to construe a statute and apply it to facts is shown in Decatur v. Paulding in which the Court refused to compel the Secretary of the Navy to allow a pension under a statute giving the power to him to construe and execute the statute, and this though the Court might differ from him in his construction.

Whether a mandamus would run against the President himself as it would against his subordinate in a case under a statute in which Congress creates a simple duty to do a simple thing has never been expressly decided, but it has been plainly intimated in a number of cases that the difficulty of enforcing a mandamus against the President if he declines to obey it, places him in a class by himself and makes it impossible for the court to compel him to perform even a ministerial duty. While it can not be said that he enjoys the royal prerogative in being above liability

for a personal suit, he does have an official freedom as President from judicial process that is not unlike that royal prerogative in certain aspects. Jefferson established the precedent in response to Chief Justice Marshall's subpoena that he could not be required to appear in court. Since that time no President has ever been summoned. In Mississippi v. Johnson, one of the grounds for refusing to enjoin the President from executing what was alleged to be an unconstitutional law, was that if the President declined to respect it, the Court had no means of enforcing its order. The other ground of course was that the question of reconstructing a state after secession, and determining whether the law authorizing it was constitutional or not was a political question for the President which the Court did not deem its duty or within its power to decide.

May Congress limit the executive power of the President by vesting part of the executive power in some of his subordinates and direct that this act shall be final and conclusive upon the President and the entire executive department? I don't think Congress could make the decision of a secretary of state or an ambassador final and independent of Presidential review in our foreign relations, or vest the action of any of his subordinates in the political field of action with finality as to him. Congress has, however, done this in cases of routine governmental administration. In the matter of the adjustment of accounts, and the drawing of money from the treasury under an appropriation act, the power to make a final adjustment of accounts is vested in the various auditors of the treasury, which shall be binding upon the whole executive department unless revised by the comptroller of the treasury, from whose decision there is no appeal. The comptroller's decision is not always final with respect to the judicial branch of the government, but it is so as to the executive. The Attorney-General, invited by the President to pass upon the effect of an appropriation act, may differ with the comptroller of the treasury, but under the statutes to which I have referred, this does not affect the finality of the comptroller's views for the President. The President may remove the comptroller but he cannot reverse his decision. So in the allowance of patents for invention, an executive act of a quasi-judicial nature, Congress has given an appeal from the commissioner of patents to the Supreme Court of the District of Columbia and it has been held that the Secretary of the Interior, the commissioner's official superior, may not interfere.

Again, in the administration of the courts, it is the duty of the Executive to carry out the judgments of the courts as the proper interpretation of the law. The President appoints the United States marshals. Suppose the President were to direct a marshal not to execute a particular decree of the court, although law required him to do so. The President might remove the marshal for disobeying his orders, but Congress has provided that if a marshal has a process delivered to him, he shall retain the power to execute the process, even after removal. If the marshal refuses to obey the order of the court, of course the court has power to punish him for contempt, but the punishment for contempt when adjudged, is to be inflicted by the executive department.

Where the judgments of the court are obstructed, the marshal doubtless has the power of summoning a *posse comitatus,* but this may be ineffective especially where the *comitatus* or county is arrayed in feeling against the enforcement of the judgment, a condition not unusual and to be expected in respect of federal courts expressly established to avoid local prejudice. In such case, the court and the marshal may call on the Executive for the use of the army to enforce the judgment of the court. Here the response to his call is within the discretion of the President. If he makes no response, then the court and its immediate executive machinery are helpless. This was the case when a Baptist missionary of Vermont named Worcester was convicted and imprisoned for a felony because without Georgia's permission he sought to christianize the Indians of an Indian reservation in Georgia over which Georgia claimed to have territorial jurisdiction. The Supreme Court, with Chief Justice Marshall at its head, held that Georgia had no such jurisdiction and reversed the sentence of conviction. Andrew Jackson, then President, declined to intervene to enforce the mandate from the Supreme Court, making the well remembered answer that John Marshall had entered the decree and now he could enforce it. In that case Worcester remained in the penitentiary for two years, long enough in the judgment of the Georgia authorities to vindicate their assertion of power, and then was pardoned. But in spite of Andrew Jackson's assertion of his control of the executive authority in that particular case, John Marshall's view of the law prevailed and is the law of the United States to-day, and no executive would think of questioning it, showing that

the battle is not always to the strong nor the race to the swift, in a conflict between the separate branches of the government.

Now what can we lay down as undoubted limitations upon the power of Congress in legislating as to the duties of the Executive?

In the first place, it is clear that Congress may not usurp the functions of the Executive by an appointment to office, by pardoning a criminal, or one accused of crime, by initiating or making a treaty, by providing for a reception of particular ambassadors, and thus recognizing a foreign government, or by forbidding or directing the movements of the army and navy.

In the administration of President Arthur, Congress passed a law authorizing the President to appoint Fitz-John Porter to be a full colonel of the United States army, and to place him upon the retired list which was enlarged for the purpose. President Arthur vetoed the bill for several reasons; one of which was that Congress had no power to create an office on condition that some particular individual should be appointed to it. Taught by this precedent, Congress, when it desired to satisfy the gratitude of the country and place upon the retired list General Grant, who was under sentence of death from a dread disease, and was writing his memoirs at Mount McGregor, it enacted a law authorizing the President to put upon the retired list of the army as a full general anyone who had been in command of an army of the Union in the field during the Civil War, and then President Arthur nominated General Grant, who was confirmed by the Senate to fill this place. Yet Congress sometimes does name persons to perform what would ordinarily be executive acts. The act providing for the erection of the Lincoln Memorial in Washington created a commission to report a design and then after approval by Congress to supervise its construction, which was composed of the President, the Chairman of the Library Committee of the House, the Chairman of the Library Committee of the Senate, the Speaker of the House, another member of the Senate, and another member of the House, instead of describing them as such, it named the persons in the act. There are many other commissions created for similar purposes under acts of Congress of which the Chairman of the Committee on the Library in the Senate and in the House are made members. They can hardly be said to be executive officers to whose duties the act adds one more, for they are members of the legislative branch. Under the act for the Lincoln Memorial Commission most of the members have ceased to be public officers and yet

they continue to perform their duties. The question has never been mooted so far as I know as to the constitutional validity of such legislation, but it has been acquiesced in.

Of course the power of appointment does not prevent Congress from prescribing qualifications for any office created by it. I presume Congress could not increase the qualifications mentioned in the Constitution for the President or the Vice President, or for a member of Congress or a senator. I would think that the rules of eligibility prescribed in the Constitution covered the whole subject and prevented Congress from adding thereto. But no such limitation can apply in offices that Congress must itself create, and for which no qualifications are stated in the Constitution. Congress has the power to provide for the raising of an army, which of course includes its organization and its discipline, and has a similar power with respect to the navy. Now an essential part of the organization, discipline and maintenance of an army and navy is the rules of eligibility in selecting those who are to act as officers, and for their promotion. This would seem to be clearly valid legislation. Some little time ago, the President did not deem satisfactory the character of an officer whose time under the law had arrived for promotion by reason of a vacancy in the next higher rank, and he declined to appoint him but appointed the next in order. The Attorney-General decided that the President had this power and could not be restricted by Congress. An attempt was made through proceedings against the Secretary of War to prevent this, but they of course failed. If the Senate concurs in this appointment, it is difficult to see how the rights of the officer passed over, if he has any under the law to promotion, can be preserved. He cannot sue for the salary attaching to an office to which he has not been appointed under the Constitution. It would therefore seem that the action of the President and the Senate is a construction of the powers of the President under the Constitution which is authoritative as a precedent and can not be subsequently questioned.

In another case with respect to the appointment of a commissioner of the District of Columbia, Congress has provided that no one shall be appointed who is not a bona fide resident of the district for three years previous to the appointment. The Senate advised and consented to the appointment of one not such a resident and then on the refusal of the accounting officer to draw his warrant for the salary, the case was carried into the

court and a judgment of the lower court was had that the ineligibility under the law of the mandate prevented his recovering his salary. In the latter case of course, the issue was as to the ineligibility of the candidate appointed. In the other case, it was the eligibility of the candidate who was not appointed. This makes a difference in the practical question whether the legality of an appointment can be inquired into by a court.

Whether the President has the absolute power of removal without the consent of the Senate in respect to all offices, the tenure of which is not affected by the Constitution, is not definitely settled. In the Johnson administration, the two-thirds Republican majorities in both Houses of Congress passed the Tenure of Office Bill which by providing that any officer appointed by the President by and with the advice and consent of the Senate should hold his office until the appointment of his successor by and with the advice and consent of the Senate, subjected the President's power of removal to the condition of the Senate's consent. While it has not been directly decided that this Tenure of Office Act was an invalid attempt to curtail the removing power of the President, there is an intimation of this kind in the case of Parsons v. United States, where a district attorney who had been appointed for four years was removed by the President before the end of his term and sued for his salary on the ground that he had been removed without the advice and consent of the Senate. The Court held that Congress in its legislation did not intend to take away the President's independent power of removal and therefore was enabled to avoid deciding the question whether Congress could validly do so. But the reading of the opinion by Mr. Justice Peckham leaves the impression that the Court regards as most persuasive of the right constitutional construction, the acquiescence for seventy years in the decision by the First Congress under the urging of Madison and the vote of John Adams that the power of absolute removal is incident to the executive power and the duty to take care of the execution of the laws.

In respect to the pardoning power, Congress may not pardon a criminal or one accused of crime. It may of course repeal the act under which one accused of crime is to be tried and in that way save him from the possibility of trial; but after conviction it may not relieve him from the effects of his punishment as imposed by the court in accordance with law, nor indeed may it change the full effect of the pardon for the benefit of the criminal

or accused person by disqualifying him from the pursuit of a livelihood or by affecting his rights as a free man. Thus it was held after the pardon of Mr. Garland that Congress might not disqualify him from practicing in the Supreme Court when he could not take the iron-clad oath in which the affiant was required to say that he had never borne arms against the government or aided or abetted treason. The Court held that this was an unconstitutional interference with the purifying effect of the pardon. In a later case, however, it sustained an act of New York which disqualified one who had been convicted as a felon and had served his term, to practice medicine, because conviction of a felony is a reasonable ground for putting a person in an ineligible list for the practice of a profession in the members of which a personal confidence must be reposed.

The intervention of Congress in our foreign relations came up for discussion in the time of Washington when Congress was called upon to appropriate money to satisfy the obligations of the government under the Jay Treaty. The House of Representatives, in which such legislation must be initiated under the Constitution, demanded that the Executive submit his confidential correspondence with Chief Justice Jay, his ambassador in the negotiation of the treaty. Washington declined to comply with the request, on the ground that neither the Lower House nor Congress as a whole was a part of the treaty-making power, and that it was not for the lower House to consider the validity or wisdom of a treaty which had been entered into in accordance with the Constitution and which was binding on the government. He said he based this view not only on the language of the Constitution, but upon his personal familiarity with the purpose of the framers of that instrument because he was a member of the Constitutional Convention and presided over its deliberations. The House of Representatives declined to acquiesce in the view and expressed its dissent in what were called the Blunt Resolutions, but it never got the correspondence and it did appropriate the money. Congress has at times passed resolutions affecting our foreign relations which the Executive in its correspondence with foreign countries had declined to recognize as an authoritative expression of our government. Resolutions passed to be transmitted to a foreign government by the Congress of the United States may or may not be so transmitted by the Executive in his discretion.

I question the right of Congress to annul an existing treaty if the Executive dissents. The treaty-making power is in the

President and two-thirds of the Senate, and not in Congress. The abrogation of a treaty involves the exercise of the same kind of power as the making of it. Why then should Congress have the power to abrogate treaties when it may not make the treaties?

Congress may make an agreement with another nation by the passage of a law conditioned upon its going into effect upon the passage of a similar or corresponding law by another power. But this is not exercising strictly treaty-making power.

Then too Congress may, as we have seen in the Chinese cases, repeal a treaty in so far as it is effective as a municipal law in this country. But this is not to say that it can repeal or annul the treaty in so far as it is an international obligation of the United States.

When we come to the power of the President as Commander-in-Chief it seems perfectly clear that Congress could not order battles to be fought on a certain plan, and could not direct parts of the army to be moved from one part of the country to another.

The power to declare war is given to Congress. In the prize cases it was held that a war might arise, creating all the legal incidents of war, from a foreign invasion or a domestic insurrection like that of our Civil War, without any declaration on the part of Congress; but it is to be inferred that our courts could not recognize or enforce rights legally incident to a war of aggression against a foreign country unless declared by Congress. This is necessarily a limitation on the power of the President to order the army and navy to commit an act of war. It was charged against President Polk that he had carried on a foreign war against Mexico before Congress had authorized it or declared it, and it is difficult to escape the conclusion that the act of President Wilson in seizing Vera Cruz was an act of war without Congressional authority, at the time it was committed, though a resolution authorizing it was pending and had passed one House and was passed in a very short time after the act by the other House, constituting a valid ratification.

It is not always easy to determine what is an act of war. The President has the authority to protect the lives of American citizens and their property with the army and navy. This grows out of his control over our foreign relations and his duty to recognize as a binding law upon him the obligation of the government to its own citizens. It might, however, be an act of war if committed in a country like England or Germany or France

which would not be willing to admit that it needed the assistance of another government to maintain its laws and protect foreign relations, but would insist that injuries of this sort must be remedied through diplomatic complaint and negotiations. In countries whose peace is often disturbed, and law and order are not maintained, as in some Central and South American countries, the landing of U. S. sailors or marines in order to prevent destruction or injury to the American consulates or to the life or property of American citizens, is not regarded as an act of war but only a police duty as it were. Of course the President may so use the army and navy as to involve the country in actual war and force a declaration of war by Congress. Such a use of the army and navy, however, is a usurpation of power on his part. It is likely to awaken such popular support as to compel Congress to acquiesce and register the declaration. The truth is, however, to the honor of the Executive, the instances in our history in which the jingo spirit has manifested itself in Congress and the Executive has sought to restrain it are many more in our history than those in which the Executive has sought to involve the country in war and force Congress to give it legal sanction.

Could Congress substantially restrict the President in his use of the army to take care that the laws be faithfully executed? It would seem not. This brings me to another limitation upon Congressional power over executive action. Congress in making law and achieving the object of the law through the action of the Executive may properly prescribe the form and method in which the law shall be carried out, and thus point out the path along which in enforcing the will of Congress, the Executive must proceed. But when in respect to the particular subject matter, the President is given direct power by the Constitution so that he can act without legislation, or if he is given in the Constitution, particular means with which to execute the laws and make his constitutional power effective, Congress cannot prevent exercise of the power in the former case, nor can it prevent in the latter case his use of the constitutional means for the performance of any of his constitutional duties to which it would be appropriate.

By statute, Congress has forbidden the United States marshals to call the army as a *posse comitatus,* but that is not the use of the army by direction of the President under his power as its Commander-in-Chief. Congress might refuse to vote the appropriation for an army, or might repeal the law organizing the

army but it cannot provide an army of which the President must be Commander-in-Chief, and then in the law of its creation limit him in the use of the army to enforce any of the laws of the United States in accordance with his constitutional duty.

I had in my own administration a question not unlike this. It is the duty of the President to advise Congress on the state of the Union, and to recommend measures for its consideration. The Constitution provides for the creation of departments, with heads, obviously for the purpose of enabling the President to discharge his executive duties. When Congress has made such provision and there are departments with bureaus, to whose heads and subordinates the President must look for advice and information as to the workings of the government, which shall enable him in turn to inform Congress as to the state of the Union, and to recommend appropriate measures, Congress may not restrict his use of them for the purpose. Congress appropriated a sum of money to enable me to appoint an Economy and Efficiency Commission, to report plans by which governmental methods might be reformed in the interest of economy and efficiency. The Commission recommended that the estimates for government expenses be framed for the next year in a budget which they described. I forwarded this recommendation to Congress in a message, and announced my purpose to have a budget for the current year prepared in accordance with their recommendations and to submit it to Congress. Congress at the instance of the appropriation committee put a rider in the appropriation bill directing that in effect no heads of departments, no bureau chiefs and no clerks should be used for the preparation of estimates in any other form than as that directed by the existing statutes. This was for the purpose of preventing my submitting to Congress the estimates for government expenses in the form different from that of the statutes and in accordance with the budget principle. When the heads of departments applied to me to know what they should do, I directed them to prepare the estimates under the old plan as required by statute and also to prepare the budget as recommended by my Commission, and to ignore this restriction, which Congress had attempted to impose. I did so on the ground that it was my constitutional duty to submit to Congress information and recommendations and Congress could not prevent me from using my subordinates in the discharge of such a duty. The budget was prepared accordingly and I submitted it to Congress, in whose archives it now rests covered with three

inches of dust. But I am hopeful that some day the dust may be removed and the reform embodied in its suggestions may be carried to useful results.

The duty that the President has to take care that the laws be faithfully executed applies not only to the statutory enactments of Congress, but also to treaties and to those obligations not contained in any treaty or statute but to be implied from the structural relation of the government to the individual or official in whose behalf the obligation is asserted by the United States. The first case is the common one, that arising under a statute of Congress. The second case is illustrated by the Jonathan Robbins Case in which, under the Jay Treaty, President Adams issued his warrant for the arrest of Jonathan Robbins and had him delivered by the United States marshal to an agent of the English government as a fugitive from justice of England, charged with murder. Robbins was a sailor on an English vessel and had killed the mate at sea and escaped to South Carolina, where he was arrested and charged with piracy. The examining federal court held that it was not a case of piracy and then President Adams, on the assurance of the judge that there was evidence enough to commit him for the murder, issued his warrant under the Jay Treaty and this without any auxiliary legislation to carry the treaty out. Edward Livingston, then a congressman from New York, introduced resolutions attacking President Adams for a usurpation of power resulting, as claimed, in a judicial murder. John Marshall, also then a member of Congress, defended Adams. His argument is reported in 5th Wheaton, printed there by direction of the Court, and has since been held by the Supreme Court through Mr. Justice Gray to be a correct exposition of the President's constitutional power under a treaty.

A similar instance came within my own official cognizance when I was Secretary of War. In the absence of Mr. Root, Secretary of State, President Roosevelt sent me to Cuba to see if we could compose a revolution against President Palma's government in that Republic. We found a revolution flagrant, and we felt that intervention was necessary, and the question was whether the President, without action by Congress, could use the army and navy and intervene under the so-called Platt Amendment of the treaty between Cuba and the United States. That amendment was in part as follows:

> "The Government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, and the maintenance of a government adequate for the protection of life, property and individual liberty."

I advised the President that this treaty, pro tanto, extended the jurisdiction of the United States to maintain law and order over Cuba in case of threatened insurrection, of danger of life, property and individual liberty, and that under his duty to take care that the laws be executed this was "a law" and his power to see that it was executed was clear. Events followed quickly our investigation and recommendations, and I was obliged to ask for the army and navy and by authority of President Roosevelt to institute a provisional government, which lasted nearly two years. It restored order and provided a fair election law, conducted a fair election, and turned the government over to the officers thus elected under the Constitution of Cuba. There were some mutterings by senators that under the Platt Amendment, Congress only could decide to take action. However, the matter never reached the adoption of a resolution. Congress appropriated the money needed to meet the extraordinary military and naval expenditures required, and recognized the provisional government in Cuba in such a way as to make the course taken a precedent.

The Neagle Case illustrates the third class of cases which imposes the duty of action upon the President when there is no express provision of statute or treaty, but when the obligation of the government and therefore of the President is to be implied. In that case it was held that there arose from the Constitution and statutes of the United States creating courts and judges an obligation on the part of the government to take proper steps to protect its judges in the discharge of their duties, which authorized and required the President where exigency suggested its necessity, to direct the marshal to protect the judge on his circuit from the assault of a disappointed litigant. The Court followed the same principle in the Logan Case in holding that under a statute punishing conspiracy to deprive a person or a citizen of a right secured by the Constitution or laws of the United States, an indictment would be sustained against men banding as conspirators to kill prisoners in custody of the United States marshal by commitment of the federal court, on the ground that, though there is no express declaration of law that the government shall

protect prisoners against such associates, the duty of the government arises by implication from its power to confine them and to deprive them of the means of defending themselves.

A similar case came within my own official cognizance. Congress provided that all military, civil and judicial powers, as well as the power to make rules necessary for the government of the Canal Zone, should be vested in such a person and should be exercised in such a manner as the President should direct, until the expiration of the 58th Congress. The 58th Congress expired without any further provision being made for the government of the Zone. I was Secretary of War from 1904 to 1908 and in charge of the canal work. We had forced upon us, of course, the question what should be done in this legislative lapse of government after the death of the 58th Congress. I advised the President that under his statutory duty imposed on him by the Spooner Act, to build the Canal, through a Canal Commission, and under his constitutional duty to take care that the laws be faithfully executed, he was obliged to maintain the existing government and continue *the status quo* which was necessary to the construction of the Canal. Congress made no further provision for the government of the Zone for seven years, and by its acquiescence vindicated this view of the President's duty. The truth was that Congress did not know exactly what kind of a government it wished and left the responsibility to the President.

The President is as much bound by the Constitution as he is by a legislative act. He is bound to attribute great presumptive validity to an act of Congress, and he may not lightly hold that Congress has exceeded its constitutional power in enacting laws. Congress itself must construe its constitutional powers first before it passes laws and the Executive as well as the courts are bound to presume that it has not abused its legislative discretion to determine its own powers, unless the violation of the Constitution is clear beyond reasonable doubt. Nevertheless the Constitution is as binding on the Executive as on the courts and if the Executive is clear beyond reasonable doubt that the law is invalid, for lack of congressional power, it is difficult to escape the argument that he has a right and a duty to decline to enforce it. When the Supreme Court has passed upon the point, may he disregard its opinion sustaining the law and still refuse to enforce it? Thomas Jefferson asserted the affirmative in respect to the

charter of the United States Bank. The same view was taken by Andrew Jackson in vetoing the renewal of the charter of the United States Bank; and Abraham Lincoln in discussing the effect of the opinion in the Dred-Scott Case declined to admit that this bound him to the view that the Missouri Compromise was unconstitutional. Of course if an executive refused to execute the law, it may constitute a high crime and misdemeanor, and subject him to impeachment. Would it be a good defense if he satisfied the court, that his action was based on a sincere conviction of the invalidity of the law, or would the principle that ignorance of the law excuses no one apply?

A difference between the Executive and the Supreme Court on a question of the power of Congress must always result in the victory of the Court as it did in the controversy over the Bank between Jefferson and Jackson on one side and Marshall on the other. The Court is a continuous body, and the law of its being is consistency in its judicial course. Presidents come and go, but the Court goes on forever.

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